Supreme Court, U.S.
FILED

NO. 931393 MAR 7 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN AND MALVINA GALLODORO
Petitioners

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED FOR REVIEW

Is there requisite federal diversity jurisdiction when the plaintiffs are members of the defendant mutual insurance company by virtue of the payment of a membership fee entitling the plaintiffs to voting rights and participation in the profits of the mutual?

II.

Must there be an evidentiary hearing to determine both state of incorporation and principal place of business before a federal district court accepts jurisdiction?

III.

Do the provisions of U.S.C.A. 28:1332 C(1) establish the domicile of the defendant as a matter of law when the action is a direct action by the insured against his liability carrier under the uninsured motorist provisions and medical pay provisions of the insured's liability policy?

LIST OF PARTIES

The following are the parties to this proceeding:

Stephen and Malvina Gallodoro
Petitioners

State Farm Mutural Automobile Insurance Company
Respondent

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The per curiam opinion of the United States Court of Appeal, Fifth Circuit, is reproduced in Appendix A.

The order of the United States District Court, Eastern District of Louisiana, denying the motion to remand is unreported and is reproduced in Appendix B.

JURISDICTION

Petitioners seek review of the judgment of the United States Court of Appeal, Fifth Circuit, entered on December 7, 1993.

This Petition is timely filed pursuant to 28 U.S.C.A. 2101(C). This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. 1254(1).

STATUTES PRESENTED FOR REVIEW

TITLE 28, Section 1332-A(1) and C(1)

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between -

(1) citizens of different states;

(c) For the purposes of this section and section 1441 of this title -

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that *in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen,* as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business;

STATEMENT OF THE CASE

State Farm Mutual Automobile Insurance Company is a domestic unincorporated Illinois mutual which was organized in 1922 in Bloomington, Illinois pursuant to Articles of Association filed with the Insurance Commissioner. A certificate of insurance was thereafter issued by the Commissioner.

State Farm has never been issued a corporate charter by the State of Illinois nor has it qualified to do business in Louisiana as a foreign corporation.

Respondent operates in the State of Louisiana by virtue of a certificate of insurance issued to it by the Insurance Commissioner of the State of Louisiana.

Respondent is the largest single automobile insurer in Louisiana and maintains its Southeastern Regional Of-

fice in Monroe, Louisiana at 22 State Farm Boulevard which is also its address for service of process.

State Farm is a major Louisiana property owner, a property taxpayer and a major Louisiana employer.

To join the mutual insurance group an insured is required to pay a membership fee which entitles the insured to voting rights at the annual meeting held at the home office in Bloomington, Illinois and participation in the profits of the association by paying reduced insurance premiums or receiving payments of dividends.

Petitioners joined the mutual by paying the requisite membership fees and premiums and were insured members for approximately 20 years.

The policy of insurance issued by State Farm to petitioners was contracted for in Louisiana and all premiums due were paid in Louisiana. The Policy was also issued in Louisiana by the Midsouth Regional Office of State Farm in Monroe, Louisiana.

The mutual terms and conditions of the policy describe the structure of the business entity known as a mutual benefit membership organization - a partnership of insureds.

Petitioners as members of the mutual and insureds of State Farm, were involved in an automobile accident in the City of New Orleans with a Michael Donato, a Louisiana domiciliary, who was insured by Automotive Casualty, a Louisiana insurance company, and domiciliary.

The magnitude of the injuries sustained by Malvina Gallodoro exceeded the primary coverage of the Donato policy which was $10,000.00. Donato and his insurer settled with the petitioners for policy limits without the necessity of suit making the provisions of State Farm's policy operative as to medical payments and uninsured motorists coverage.

It became necessary for petitioners to file a suit to collect medical payments and damages due under the medical pay and uninsured motorist provisions of their policy which suit they filed in the Civil District Court for the Parish of Orleans, State of Louisiana, a state forum of proper personal and subject matter jurisdiction.

State Farm removed to Federal Court alledging that it was a foreign corporation. Petitioners filed a motion to remand based on the fact that State Farm is a Louisiana limited partnership and domiciliary by virtue of having the same domicile as that of its constituent members.

The motion to remand was denied by the district judge without any evidentiary hearing on the issues of alleged incorporation and state of incorporation. Principal place of business was not pleaded nor proved.

A supervisory writ to the Fifth Circuit Court of Appeal was also denied.

The case therefore proceeded to trial in the United States District Court for the Eastern District of Louisiana and was by agreement of counsel tried before a magistrate because of the crowded docket of the district court which

had resulted in numerous continuances over the protracted course of litigation.

Petitioners attempted on the first day of trial before the Magistrate to reurge their motion to remand for lack of diversity jurisdiction which attempt was not permitted by the magistrate. This controversey between opposing Louisiana domiciliaries then proceeded to trial in a court lacking in jurisdiction in a matter not within the Constitution and Statutes of the United States.

The Judgment of the Court was favorable to petitioners on one issue in that it awarded some damages though in a much lower amount than would have been granted by a state court knowledgeable with state law and its application and was unfavorable to petitioners on all other issues which would have been decided differently by a state tribunal.

The decisions which were adverse to petitioners-inadequate damages, failure to award statutory damages, statutory penalties and attorney's fees were decided by a court lacking in jurisdiction and by a court which did not apply the applicable law of Louisiana as a Louisiana court deciding the same issues would have decided thereby causing substantial loss to petitioners.

Arbitrary and capricious conduct by an insurer who has sixty days to pay a direct line claim and who owes a duty of fair dealing to its insured subjects the insurer to substantial prenalties, additional damages and attorneys fees under Louisiana law, which law was not applied by the magistrate.

These adverse determinations are final, unless this Court grants a writ, determines lack of jurisdiction and remands the case to the state district court for the application of the Louisiana Law of contracts, compensatory damages, statutory damages, statutory penalties and attorneys fees.

REASONS WHY WRIT SHOULD BE GRANTED

A writ of certiorari should be granted to review the decision of the United States Fifth Circuit Court of Appeal for the following reasons:

1. The Fifth Circuit's affirmance of federal jurisdiction where none exists has resulted in the Fifth Circuit's sanctioning a departure from the usual course of judicial proceedings in diversity actions, permitting a federal district court to determine a controversey between citizens of the same state which is not within the authority of the Constitution or Statutes of the United States.

The Fifth Circuit has ignored the diversity statute U.S.C.A. 28:1332 and the Circuit's own jurisprudence as well as this Court's prior decisions which hold that there must be diversity, it must be complete diversity and that the domicile of an unincorporated association is that of its members. *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015, 1021, 108 L.Ed. 2d 157 (1990).

The Fifth Circuit's departure and conflicts with the United States Constitution and Statutes, its own jurisprudence, the law of the circuit, and with the decisions of the Supreme Court poaches upon the territory of the

state judicial system and usurps the powers of the state tribunal. Such usurpation of the state court's jurisdiction warrants an exercise of this Court's supervisory jurisdiction to declare such actions, decisions, opinions and orders of no effect and null and void ab initio.

This departure has created intercircuit conflicts and inconsistencies in the rulings of the Fifth Circuit pertaining to diversity, the method of proof and the burden of proof and is contrary to the law of the circuit.

In the instant case the Fifth Circuit has failed to apply the law of the Circuit which it has correctly stated, and enunciated in *Gerry Oil,* 841 F.2d at 1259; *McGovern v. American Airlines, Inc.,* 511 F.2d 653, 654 (5th Cir. 1975); *Whalen v. Carter,* 954 F.2d 1087; *Newport Ltd. v. Sears Roebuck & Co.,* 941 F.2d 302, 307 (5th Cir. 1991); *Buckley v. Control Data Corp.,* 923 F.2d 96; *Stafford v. Mobil Oil Corp.,* 945 Fd. 2d 803; *Temple Drilling Company v. Louisiana Insurance Guaranty Association,* 946 F.2d 390. The law of the circuit is correctly stated, howsoever, in the Gallodoro case it is incorrectly applied.

2. This Court has not as yet addressed the issue as to whether or not U.S.C.A. 28:1332 (c) (1) defeats federal jurisdiction when the direct action is between the insured and the insured's liability carrier providing uninsured motorist coverage.

U.S.C.A. 28:1332 (c) (1) negates federal jurisdiction in a controversy between a state domiciliary liability claimant against the insurer of a domiciliary tortfeasor of the same state where the tortfeasor is not joined and should also negate jurisdiction when the insured sues directly.

ARGUMENT

There is simply no federal jurisdiction in the instant case. Neither personal jurisdiction nor subject matter jurisdiction exists in this garden variety rear end collision which occurred in New Orleans, Louisiana between Louisiana domiciliaries.

The petitioners' claims arose out of a Louisiana automobile accident and a Louisiana insurance contract and involved solely Louisiana law - contract law of uninsured motorist coverage, damages, statutory damages, satutory penalties and attorneys fees between the parties to the contract all of whom were Louisiana domiciliaries.

The ruling of the district court in accepting jurisdiction did not merit a minute entry as to the law or facts which the Court believed to support jurisdiction. The motion to remand merited only one word - "Denied". Not one finding of fact or conclusion of law was recited by the district court.

The Fifth Circuit affirmed in a per curiam finding no error of fact or law leaving petitioners to guess as to why a federal district court entertained a trial between Louisiana domiciliaries on its merits and in a way contrary to the law of Louisiana.

This case which would have been handled with dispatch in a state district court became entangled in the complexities of federal judicial procedure where it was in protracted litigation for four years.

The defendant urged federal jurisdiction claiming diversity but failed to proved incorporation, state of incorporation or principal place of business.

> *"The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction." Gerry Oil, 841 F.2d at 1259; see McGovern v. American Airlines, Inc., 511 F.2d 653, 654 (5th Cir.1975.*

There was no evidentiary hearing held by the court to determine questions of fact despite the law of the circuit. In *Stafford v. Mobil Oil Corp.,* 945 Fd.2d 803 the Fifth Circuit vacated the district court's acceptance of jurisdiction where the record did not disclose jurisdiction.

> "Where a federal court proceeds in a matter without first establishing that the dispute is within the Constitution and statutes, the federal tribunal poaches upon the territory of a coordinate judicial system and its decisions, opinions, and orders are of no effect." *B. Inc. v. Miller Brewing Co.,* 663 F.2d 545, 548 (5th Cir. 1981); *Stafford v. Mobil Oil Corp.,* 945 Fd.2d 803.

The defendant produced one document, its Articles of Association filed with the insurance commissioner of the State of Illinois in 1922. The Articles of Association used the term association and corporation interchangeably. The use of the word corporation in the Articles of Association did not connote a legal corporation or a jural person, but was used as a reference to the business entity as a body of insureds. It was used in the Articles in its

American dictionary connotation and not in the legal context of a corporation.

An examination of the policy of insurance leaves no doubt that State Farm is a mutual association composed of members who are both the policyholders and owners of the mutual. The mutual conditions of the State Farm policy states:

> *1. **Membership Fees considered as additional premium for the first six months.** The membership fees provided in this policy are additional premiums for the first six months of insurance with the company, and thereafter are not returnable, and entitle the first insured named in the declarations to insure one vehicle for any applicable coverage, and to insurance for any other coverage for which said fees were paid so long as:*
>
> *a. this company continues to write such coverages;*
> *b. the vehicle to be insured meets the eligibility requirements of the company; and*
> *c. the insured remains a risk desirable to the company.*
>
> *While this policy is in force, the first insured named in the declarations is entitled to vote at all meetings of members and to receive dividends the Board of Directors in its discretion may declare in accordance with reasonable classifications and groupings of policyholders established by such Board.*

*3. **Annual Meeting.** The annual meeting of the **members** of the company shall be held at its **home office** at Bloomington, Illinois, on the second Monday of June at the hour of 10:00 A.M., unless the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at the address disclosed in this policy at least 10 days prior thereto.*

That the State Farm policy is a Louisiana policy to be governed by Louisiana law is also a declaration in the policy.

6. Terms to Conform to Statute.
If any terms of this policy are in conflict with the statutes of Louisiana, they are amended to conform to those statutes.

U.S.C.A. 28:1332 (A) confers federal jurisdiction only when opposing parties are citizens of different states.

For a business entity to avail itself of federal diversity jurisdiction, it must be incorporated. It must be a jural person and it must be domiciled in a state other than that of the opposing party and have its principal place of business in a state other than at the domicile of the opposing party.

In *Whalen v. Carter* 954 F.2d 1087, the Fifth Circuit examined jurisdiction and the domicile of an unincorporated association, a partnership, and stated,

"The diversity statute requires "complete diver-

sity" of citizenship: a district court cannot exercise diversity jurisdiction if one of the plaintiffs shares the same state citizenship of one of the defendants. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806); Mas v. Perry, 489 F.2d 1396, 1398-99 (5th Cir. 1974), cert. denied, 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed 2d 70 (1975).

State Farm as its name and the mutual conditions of the policy attest is a mutual company not a corporation.

...it is well established that a mutual insurance company is a cooperative enterprise in which the members are both insurers and insured; the Company is owned and managed by the policyholders; the business is conducted for their benefit; they are the owners of the profits and the surplus and thus a policyholdeer has rights, both as an insured and as a co-owner of the assets of the company. See 44 C.J.S. Insurance §104, page 644; Appleman's Insurance Law and Practice, Chapter 344, Section 10047, page 100; May on "Insurance", Vol. 2 page 1290. In Cooley's Briefs on the Law of Insurance, Vol. 1, (2d) Ed. page 68, it is stated:

"The members and stockholders of a mutual insurance company are, therefore, identically the same. That is to say, a stockholder of a mutual insurance company by way of premiums and who is responsible for its losses to that extent and who is entitled, when such premiums shall have been accumulated to a larger sum than is required to

pay the losses to pro rata division thereof as profits." Public Housing Administration v. Housing Authority of Bogalusa, 127 S.2d 315.

A corporation derives existence through being granted a charter by the state following compliance with certain forms "incorporator" or "incorporators". ... a corporation does not consist of persons but is a fictional person itself which functions through agents deriving their appointment as an ultimate matter from the shareholders. ... no contractual relationship exists between shareholders. In a partnership the relationship (1) is founded on the intent of the members to be partners, that is their consent thereto L.S.A. C.C. Art. 2805 No. 2 is founded on a contract between two or more persons for the pooling of property, credit, skill or industry for the mutual participation in the profits which may accrue therefrom L.S.A. C.C. Art. 1801 and is founded on the obligation of each partner to contribute in some way to the partnership enterprise. L.S.A. C.C. Art. 2801 and 1809. Martinez v. Posner, Martinez, and Padgett, 385 So.2d 525.

The mutual conditions of the State Farm policy describe the insurance entity as a Louisiana partnership and not a corporation. The policy by its terms must be intrepreted by Louisiana law.

An unincorporated association is not a "jural" person for diversity persons. *Vieer v. Horney Ester Construction.*, 69 F.R.D. 370.

When an unincorporated association sues or is sued in federal court, its citizenship for diversity purposes is deemed to be that of each of its members. *Kaplan v. Industrial Risk Insurers 86 F.R.D. 484.*

In *Carden v. Arkoma Associates,* 494 U.S. 284, 110 S.Ct. 1015, 1021, 108 L.Ed. 2d 157 (1990) this court held that the citizenship of an artificial entity for purposes of diversity is the citizenship of each of its entity's constituent members.

> "... [t]he tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnership. 110 S.Ct. at 1018 (quoting *Russell,* 288 U.S. at 480, 53 S. Ct. at 440)."

Other panels of the Fifth Circuit have consistently followed the *Carden* rule in other cases involving lack of jurisdiction over unincorporated associations whose domicile is that of its members.

Fifth Circuit decisions many of which have been recently decided correctly state the law in reversing the district courts acceptance of jurisdiction and remanding cases in which federal jurisdiction was lacking. *Stafford v. Mobil Oil Corp.,* 945 Fd. 2d 803; *Newport Ltd. v. Sears, Roebuck & Co.,* 941 F.2d 302, 307 (5th Cir. 1991); *Temple Drilling Company v. Louisiana Insurance Guaranty Association,* 946 Fd.2d 390; and *Whalen v. Carter,* 854 F.2d 1087.

The law of the circuit succinctly stated is that there

must be complete diversity of citizenship before diversity jurisidiction can be invoked and granted. (*Whalen v. Carter,* 854 F.2d 1087; *Buckley v. Control Data Corp.,* 923 F.2d 96).

There is no diversity of citizenship where limited partners bring action against the limited partnership as an entity. *Buckley* (supra); *Newport* (supra). The citizenship of a mutual is that of its members, *Temple* (supra) and there must be an evidentiary hearing and jurisdictional findings, *Stafford* (supra).

The district court made no jurisdictional findings contrary to the dictates of *Stafford* (supra) and was affirmed. The district court disregarded the law of the circuit as ennunciated in *Whalen,* (supra); *Newport,* (supra); *Stafford* (supra) and *Temple,* (supra) and yet was affirmed by the Fifth Circuit who also disregarded Circuit law and Supreme Court decisions.

Neither the district court nor the Fifth Circuit applied its law or the law of this court.

In 1964 U.S.C.A. 28:1332 (C) (1) was amended by Congress to specifically address the issue of the proliferation of federal litigation involving state automobile accident cases. These cases were and to some extend are still clogging the docket of the federal courts.

Many diversity cases were eliminated by making incorporated and unincorporated insurance entities domiciliaries of their respective insured's state.

In 1988 congress again amended U.S.C.A. 28:1332 to raise Jurisdictional amount from $10,000 to $50,000 specifically to address the issue of federal jurisdiction in state automobile accident cases.

The provisions of the law (U.S.C.A. 28:1332 (C) (1) should also be interpreted to make the insurer a domiciliary of the insured's state of residence when the action is between the insured and the insurer, and not a third party claiming damages because of liability.

The aforestated issue has not been addressed by this Court but should be. There is no legal basis or rationale for concluding that U.S.C.A. 28:1332 (C) (1) does not apply to uninsured motorist claims between the state domiciliary insured and its insurer.

It seems somewhat irrational and illogical to make the insurer a domiciliary of the defendant tortfeasor's state thereby precluding federal jurisdiction when a state domiciliary sues the insurer of another state domiciliary and granting federal jurisdiction when the state domiciliary must sue his own insurer with whom he contracted in his domiciliary state in a matter involving a contract entered into and governed by state law.

In 1991 then Chief Judge Clark declared a state of emergency in the Fifth Circuit because of the proliferation of litigation and shortage of judges.

The recent aforestated Fifth Circuit cases on jurisdiction were lacking jurisdiction, yet all had proceeded through the system through the Fifth Circuit and

demonstrate that the proliferation of cases lacking in jurisdiction has resulted from failure to make jurisdictional findings of fact at the entry level to the federal system.

Costly and protracted litigation which could have been avoided at the entry level by documentary proof by way of certified copies of corporate charters and other documents evidencing principal place of business should be made a pre-requisite to removal and an evidentary hearing on the issue of jurisdiction conducted prior to any status conferences, pretrial conferences, discovery and protracted and expensive trials and appeal.

CONCLUSION

A writ should be granted and all orders and judgments entered by the district court and affirmed by the Fifth Circuit declared null and void ab initio because of the absence of diversity jurisdiction as this matter was not within the Statutes and Constitution of the United States. The case should be remanded to state court for a determination of petitioner's rights and remedies by a court of competent jurisdiction.

Respectfully submitted,

LAW OFFICES OF
EVANGELINE M. VAVRICK
912 Louisiana Avenue
New Orleans, Louisiana 70115
(504) 899-5555

By:
Evangeline M. Vavrick

PROOF OF SERVICE

I, Evangeline M. Vavrick, attorney for the petitioners and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Matthew J. Ungarino
Law Offices of Matthew J. Ungarino
1470 One Lakeway Center
3900 North Causeway Boulevard
Metairie, Louisiana 70001
Attorney for Respondent

By mailing a copy thereof, postage prepaid addressed to his office, this 4th day of March, 1994.

_____

EVANGELINE M. VAVRICK

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3898

FILED
DEC 07 1993

STEPHEN GALLODORO, and
MELVINA GALLODORO,

Plaintiffs-Appellants,

versus

STATE FARM INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(90-CV-5025 M 4)

Before POLITZ, Chief Judge, GARWOOD and DUHE, Circuit Judges.

PER CURIAM:*

This matter is before the court on appeal of the decision of the magistrate judge after a bench trial. Having considered the briefs, oral arguments of counsel, and pertinent parts of the record, and finding neither clearly erroneous finding of fact nor error of law or abuse of discretion, the judgment appealed is AFFIRMED.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX B

U.S. District Court
USDC for the Eastern District of Louisiana (New Orleans)

CIVIL DOCKET FOR THE CASE #: 90-CV-5025

Gallodoro, et al v.
State Farm Ins. Co.
Assigned to: Judge Peter Beer
Demand: $50,000
Lead Docket: none
Dkt# in CDC Orleans is 90-23014

Filed: 12/26/90
Nature of Suit: 110
Jurisdiction: Diversity
Division E

Cause: 28:1446 Petition for Removal

STEPHEN GALLODORO plaintiff	Evangeline M. Vavrick (504) 899-5555 [COR LD NTC] Attorney at Law 912 Louisiana Ave. New Orleans, LA 70115 (504) 899-5555
MALVINA GALLODORO Plaintiff	Evangeline M. Vavrick (See above) [COR LD NTC]

v.

DATE OF ENTRY NOV 07 1991

STATE FARM INSURANCE COMPANY defendant	Matthew J. Ungarino [COR LD NTC] Attorney at Law 3900 N. Causeway Blvd. Suite 1300 Metairie, La 70002 (504) 832-0999
	Patrick Joseph Sanders [COR] Attorney at Law 3900 Causeway Blvd.
COURT REPORTER: RHONDA BALLARD	Suite 1300 Metairie, LA 70002 (504) 832-0999

90-5025 M WEDNESDAY, NOVEMBER 6, 1991 9:30
Pltfs Mtn to Remand To CDC, Orleans Parish.(56)

Oral argument: Motion DENIED.